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ABBREVIATIONS USED IN THIS BRIEF

(App . . .), when used with arabic numerals, refers to Appendix to Petition for Certiorari filed by Day-Glo Color Corp. et al. in number 871 of the October term, 1970, and pagination to that appendix.

(MR . . .) refers to the Report of the Special Master underlying the judgment sought to be reviewed and pagination to that report.

(Petition . . .) refers to Petition for Certiorari in No. 871 and pagination to that petition.

In the Supreme Court
of the
United States

October Term, 1970

No. 871

Day-Glo Color Corp. (formerly Switzer Brothers, Inc.), Robert C. Switzer and Joseph L. Switzer,

Petitioners,

vs.

Harry P. Locklin and Elmer J. Braun, general partners doing business under the firm name of Radiant Color Company,

Respondents.

BRIEF IN OPPOSITION

The petition presents no question warranting this Court's attention and the complaints which it urges are without substance. Petitioners raise no question of interest to the general public. Instead, the issues are routine and relate almost entirely to the controversy between the parties. Adequate standards for the resolution of these issues have been announced by this Court and other courts as well and have been rightfully followed in this case.

The petition properly describes the opinions below and the basis for jurisdiction of this Court (Petition 2-3), together with the statute and rules involved (Petition 6). In other areas a restatement is required.

QUESTIONS PRESENTED

Questions 2 and 5 alone are stated with objectivity. Questions 1, 3 and 4 (Petition 4-5) are argumentative and include within their ambit assumptions of factual premises which have been thrice held either unproved or overcome by other salient factors. Questions 1, 3 and 4 are restated below.

1. Whether proper standards for measuring antitrust damages were declared and applied in the light of the record taken as a whole in this case.

3. Whether the attorneys' fees awarded in this private antitrust case are reasonable based upon the record as a whole.

4. Whether a dismissal without prejudice by an antitrust claimant of a co-pending action against a co-conspirator operates as a matter of law to discharge a prior judgment obtained by that claimant against other joint participants in the same wrong.

STATEMENT OF CASE

Respondents' claim against petitioners for damages arising under the antitrust laws was tried in two installments. The issues of violation and liability were tried first. That trial culminated in a judgment that petitioners vio-

lated the antitrust laws and that respondents were entitled to damages (App 47-50). The judgment was affirmed on appeal (App 51-70) and this Court denied certiorari (App 3).

The District Court referred the damage issues to a special master (App 3). Forty-three days were spent in presenting evidence and argument to the master, the record amounting to 9,000 pages of documents and testimony (App 4). Prior to filing a 231-page printed report, the master submitted a draft report and conducted hearings on the suggestions of the parties (MR 13-14). After that first review of petitioners' contentions, the master filed his printed report in which he found single damages in the amount of $356,792.91 and reasonable attorneys' fees in the amount of $75,000 (MR 217-218).

The District Court adopted the master's report in toto (App 31-33) and entered judgment for $1,070,378.73 as treble damages and for $75,000 as reasonable attorneys' fees (App 32). Petitioners and respondents both appealed from that judgment, petitioners complaining that the damages were excessive (App 6-30) and respondents complaining that the award was inadequate (App 4-6). The Court of Appeals affirmed in all respects (App 23).

With regard to general damages, petitioners urge, point (i), that prior findings of the District Court precluded a general award of damages (Petition 8-11 and 22). This same point was made to the master, the District Court and the Court of Appeals and was found to be wholly without merit (MR 16-19, App 29-30, App 15-16). The discussion of the Court of Appeals to the point

(App 15-16) considers petitioners' complaint in full detail and concludes (App 16) that "Switzer's interpretation of the findings seems strained".

Petitioners next state, point (ii), that damages have been awarded for lost sales not caused by antitrust violation (Petition 11-12, 22). This same argument was made to the master, the District Court and the Court of Appeals and was rejected on the basis of the record as a whole (MR 136-183, App 31, App 13-15). The Court of Appeals' decision is direct and to the point (App 13-15). Reviewing the record as a whole, the Court of Appeals held that "If the master allowed Radiant damages for losses which were not caused by Switzer, reversal is required." (App 14); reviewed the record as a whole (App 14-15); and concluded that "The master was correct in determining that Radiant's lost sales were 'caused' by Switzer" (App 15).

Petitioners' point (iii) that there was error in using gross sales instead of net sales (Petition 13-14, 22) is another issue upon which petitioners have already secured several reviews. The Court of Appeals gave special attention to petitioners' point (App 16-17) and concluded that "the master took an extremely conservative approach, giving Switzer the benefit of any doubt. No just cause for complaint has been shown . . ." (App 17).

The Court of Appeals made similar disposition of petitioners' point (iv) complaining of the estimates (Petition 15-16, 23). The Court of Appeals carefully analyzed the expert testimony (App 18-20) and found that the master's determination was quite conservative (App 20). And indeed it was. One of the experts esti-

mated that Radiant experienced lost sales of $3,361,100 upon which the profits would have been $630,900 and the other estimated that Radiant lost sales of $3,657,100 upon which Radiant lost profits of $686,369 (MR 171-172). The master found that lost sales were $1,906,600 upon which the lost profits amounted to $314,656 (MR 184). The award was thus less than half of the lower estimate. Further, as pointed out in respondent's own Petition for Writ of Certiorari filed in this term as No. 823, none of these figures makes any allowance for the ravages of inflation. This case simply does not warrant a nit-picking approach toward isolated minutiae taken out of context of the record as a whole.

On the rate of profit also, petitioners' point (v) relating to alleged errors of arithmetic (Petition 16, 23), the Court of Appeals gave most careful consideration and found it without merit (App 20-22).

The foregoing, in part, forms the basis for petitioners' complaint that there has been no review under the clearly erroneous rule (Petition 17-18 and 23). The District Court, in the first instance, found that the Master's "findings of fact are adequately supported by the evidence" (App 30). Any alleged error arising from the alleged mistakes in arithmetic simply does not withstand scrutiny of the entire record. The Court of Appeals carefully pointed out that the parties were entitled to a real review (App 4), considered in detail the record bearing upon petitioners' complaints (App 6-22) and concluded (App 21-22): "The resulting net profit figure is, then, a composite one, combining arithmetical calculations and value judgments attributable to imprecise factors. . . . It is

improper to isolate individual factors entering into a decision and treat them as controlling considerations."

Similarly, with respect to the complaint as to attorneys' fees (Petition 18-19, 23), a careful review was given and the award was found "adequately supported by documentary evidence" (App 9-10).

The same is true of the effect of the Sherwin Williams settlement which petitioners discuss (Petition 20 and 23). The District Court gave this defense special attention and rejected it on the facts (App 28-29). The Court of Appeals found the facts otherwise than petitioners' naked statement (App 6-8).

Finally, petitioners come to their only question of general interest, that is the issue of treble damages (Petition 20-21, and 23). The Court of Appeals gave careful attention to the authorities and concluded that 15 U.S.C. 15 requires a trebling of the damage award (App 8-9). The Court of Appeals found that the cases present no conflict in need of resolution as the two lines of authority are distinguishable (App 8). Thus, the issue is not ripe for further review in this Court. The Court of Appeals' opinion is fair on its face and is adequate authority for other courts to follow.

REASONS FOR ALLOWANCE OF WRIT

The reasons which petitioners submit for the allowance of writ (pages 22-23) are based entirely upon its one-sided selection of bits and dabs of evidence seeming to support a complaint that it has been wronged. We have shown, we submit, that petitioners' contentions have been

given careful consideration at every stage of the case and have been found unsupportable by the record. We submit that it is not the purpose of the writ of certiorari to provide a third level of review of facts and evidence unless there is some question of public policy which requires guidance to the lower courts.

In short, petitioners' only plea to public interest is that the Court "has not dealt with standards governing the award of damages since *Eastman Kodak* (1927), 273 U.S. 359, *Story Parchment* (1931), 282 U.S. 555, *Bigelow* (1946), 327 U.S. 251, and *Zenith Radio* (1969), 395 U.S. 100 . . ." (Petition 22). Our answer is that these four cases give adequate instructions to the lower courts on the "bread and butter" issues raised in the present petition. One need only glance at the October 1970 issue of Shepards' United States Citations to confirm that the lessons of that line of cases are being currently applied with consistent regularity. In the case at bar, the Court of Appeals followed *Bigelow* and *Zenith* in the opinion under attack (App 11, 12 and 20) and the District Court followed both *Story Parchment* and *Bigelow* in confirming the Master's award (App 27-28).

For the reasons stated, we submit that the petition in No. 871 should be denied.

Respectfully submitted,

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